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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 692

ARTHUR GOLDSTEIN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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Petitioner, Arthur Goldstein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in the above styled case on October 4, 1962.

OPINIONS BELOW

No opinions were rendered either by the Corporation Court of the City of Norfolk, Virginia, or the Supreme Court of Appeals of Virginia.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was pronounced on October 4, 1962 denying the petition of Arthur Goldstein for a writ of error to a judgment rendered by the Corporation Court of the City of Norfolk, Virginia, on April 5, 1962.

Petitioner has no further appellate remedy under the laws of the State of Virginia.

The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether Section 18.1-228, Code of Virginia, as amended, violates the First Amendment of the United States Constitution.

2. Whether the conviction of a magazine retailer for knowingly possessing obscene literature violated the First Amendment of the United States Constitution where the alleged obscene literature included two magazines called "Sunshine & Health" and the magazine called "Sun Magazine" and four magazines called "Helios", which magazines have been declared by this Court as not being obscene.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment to the United States Constitution.

Section 18.1-228, Code of Virginia, as amended, to-wit:

"Production, publication, sale, possession, etc., of obscene items.—Every person who knowingly:

"(1) Prepares any obscene item for the purposes of sale or commercial distribution; or

"(2) Prints, copies, manufactures, produces, or reproduces any obscene item for purposes of sale or commercial distribution; or

"(3) Publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits any obscene item, or offers to do any of these things; or

"(4) Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item, shall be guilty of a misdemeanor. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section."

STATEMENT OF THE CASE

I. *Procedural History of the Case*

Petitioner was charged with violation of Section 18.1-228, Code of Virginia, as amended, which provides that knowingly possessing obscene literature is a misdemeanor.

The trial was had on April 5, 1962 before a jury in the Corporation Court of the City of Norfolk, Virginia. The jury found petitioner guilty and imposed a fine of $500.00.

Petitioner filed a petition for appeal in the Supreme Court of Appeals of Virginia which on October 4, 1962 refused to grant a writ or error, the effect thereof being to deprive petitioner of a right to appeal and there is no intermediate appellate court in Virginia. Petitioner has no further remedy for appellate review in the state courts of Virginia.

II. *The Facts Material to the Questions Presented*

Petitioner operates a small retail store selling magazines, books, soft drinks and candy at 311 Granby Street in the City of Norfolk, Virginia. On November 29, 1961 certain police officers of the Norfolk Police Department went to petitioner's store and removed therefrom thirty-three magazines and books which over objection and exception were introduced into evidence before the jury.

Petitioner presented no evidence after the court overruled his motion to strike the evidence of the Commonwealth on the ground that the magazines as a matter of law were not obscene.

III. *Federal Question Raised Below in Trial Court and Before the Supreme Court of Appeals of Virginia*

(A) In Trial Court:

When petitioner moved to exclude the evidence of the Commonwealth, one of the grounds for the motion was

that the statute violated the Constitution of the United States (Tr. p. 13).

Another ground for petitioner's motion to exclude the evidence of the Commonwealth was that the magazines introduced into evidence were not obscene as a matter of law (Tr. p. 34, 14).

Proposed instruction D-2, which was refused by the court, told the jury to find petitioner not guilty unless the jury believed beyond a reasonable doubt that petitioner knowingly violated the statute (Tr. p. 37).

Exception was taken to the granting of instruction C-1 on the ground that the statute was unconstitutional (Tr. p. 36, 39).

Proposed instruction D-5, which was refused by the court, told the jury to find the defendant not guilty if the jury believed that the Commonwealth had failed to establish scienter (Tr. p. 38).

Proposed instruction D-7, which was refused by the court, told the jury to find petitioner not guilty if the Commonwealth had failed to prove beyond a reasonable doubt that the petitioner knowingly violated the statute.

Proposed instruction D-9, which was refused by the Court, told the jury that the word "knowingly" is equivalent to the word "wilfully" in that it imparts the knowledge that the facts exist which constitute the act of a crime.

Proposed instruction D-6, which was refused by the court, defined the meaning of scienter.

(B) Before the Supreme Court of Appeals of Virginia:

Under the Rules governing appeals in the Supreme Court of Appeals of Virginia, the petitioner must file "Assignments of Error" within 60 days from date of final judgment.

In the Assignments of Error filed below in this case, petitioner specified as his 4th, 8th, 9th, 10th and 12th Assignments of Error that the Corporation Court of the City of Norfolk, Virginia, erred in refusing the proposed instructions D-2, D-5, D-6, D-7, and D-9. The 25th Assignment of Error stated that the court erred in refusing to declare as violative of the Constitution of the United States Section 18.1-228, Code of Virginia, as amended.

The 3rd Assignment of Error stated that the court erred in granting instruction C-1 which paraphrased Section 18.1-228, Code of Virginia, as amended.

The 15th Assignment of Error stated that the court erred in overruling the objection of counsel for petitioner to the introduction of 33 magazines admitted as Commonwealth's Exhibit 1.

The 18th Assignment of Error stated that the court erred in receiving into evidence the magazine entitled "Gymnos, December, 1961" as Commonwealth's Exhibit 2.

The 19th Assignment of Error stated that the court erred in receiving into evidence the magazine entitled "Helios, January, 1962" as Commonwealth's Exhibit 3.

These grounds specifying error were contained in petitioner's petition for appeal which was filed in the Supreme Court of Appeals of Virginia.

The brief in opposition to the petition for appeal which was filed by Charles R. Cloud, Assistant Attorney for the Commonwealth, Norfolk, Virginia, at page 3 thereof, stated that the instant case turns on a determination of the point involved, whether or not border line pornography can be found in violation of a state obscenity statute without violating the Constitution of the United States, as applied to state action. The Commonwealth discussed this point at pages 3, 4, 5, 6, 8 and 9 of its brief.

ARGUMENT

I. Certiorari should be granted in the instant case because this Court has ruled that certain nudist magazines were not obscene whereas the State of Virginia has ruled that the same magazines are obscene.

An inspection of Commonwealth's Exhibit 1 shows two magazines called "Sunshine & Health" being the March, 1961 and November, 1961 issues. This particular magazine was declared as a matter of law as not obscene by the Supreme Court of the United States, in *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372, which reversed the Court of Appeals for the District of Columbia, which in turn had affirmed the action of the trial court in holding that the magazine was obscene. The district judge in 128 F. Supp. 564 found as a fact that the magazine contained photographs of naked men, women and children and were obscene because the photographs showed the pubic hair around the

privates and held that the magazines were nonmailable, being obscene within the prohibition of 18 U.S.C. Sec. 1461. The magazine involved was the issue of "Sunshine & Health" for February, 1955. The Court of Appeals affirmed the district judge in holding that the Postmaster General should not be enjoined by the publisher of the magazine from impounding the magazine copies and that declaratory judgment of the Court was that the magazines were obscene. The Supreme Court of the United States in a per curiam decision reversed the case.

Also included in Commonwealth's Exhibit 1 was a magazine called "Sun Magazine", February 1961 edition, published by the International Journal of Nudism. In the case of *Sunshine Book Co.* v. *Summerfield*, supra, in addition to the "Sunshine & Health" magazine, was the January-February, 1955, issue of "Sun Magazine", the same magazine involved in this case, and the Supreme Court of the United States decision applies to it as well as "Sunshine & Health".

Also included in Commonwealth's Exhibit 1 were issues of a magazine called "Helios", published in Denmark, devoted to physical and psychical ideas, being the issues for May, 1960, December, 1961, January, 1962 and January, 1960. This magazine was also admitted into evidence as Commonwealth's Exhibit 3. This magazine was declared as a matter of law as not being obscene by the Supreme Court of the United States in the case of *Mounce* v. *United States*, 355 U.S. 180, which reversed the opinion of the Court of Appeals for the Ninth Circuit in 247 F. 2d 148. The Court of Appeals for the Ninth Circuit adopted as its opinion that of the district judge for the Eastern District

of Washington, N.D., in 134 F. Supp. 490. The Customs Service had filed an action for the forfeiture of obscene publications within 19 U.S.C.A. Sec. 1305 (a), the style of the case in the District Court being *4200 Copies of International Journal*. Among the items confiscated were the "Helios" magazines. The trial court held that the magazines had the dominant effect of showing nude figures of both men and women with emphasis on normally private areas and were obscene within the statute prohibiting the importation of obscene books and pamphlets.

II. Certiorari should be granted in the instant case because the remaining magazines and booklets were not obscene under the First Amendment of the United States Constitution.

In *One, Inc.* v. *Olesen*, 355 U.S. 371, the Supreme Court of the United States reversed the Court of Appeals for the Ninth Circuit. The publisher of the magazine called "One" which was designated "The Homosexual Magazine", filed an action to declare that the magazine was not obscene and to require the Postmaster to mail the magazine. The trial court found as a fact that the magazine was obscene and the Court of Appeals affirmed the trial court. In its opinion at 241 F. 2d 772, the Court of Appeals specifically contended as obscene an article dealing with the Lesbian's influence on a young woman 20 years old, a poem about a British peer's homosexual activities and certain pictures and sketches. The Supreme Court of the United States in a per curiam opinion held that the magazine was not obscene.

The most recent case from the Supreme Court of the

United States was decided on June 25, 1962, reported in 30 Law Week 4490 No. 123 - October Term, 1961, under the style of *Manual Enterprises, Inc.* v. *J. Edward Day, Postmaster General of the United States.* The Post Office Department, the District Court and the Court of Appeals for the District of Columbia, 289 F. 2d 455, barred from the mails a shipment of magazines as being obscene within 18 U.S.C. Sec. 1461, which makes it a crime to use the mails knowingly for mailing an obscene article. Mr. Justice Harlan wrote the majority opinion and specifically held that the magazines consisting largely of photographs of nude, or near nude, male models and giving the names of each model and the photographer, together with the address of the photographer, were not obscene. The Court accepted the fact that the magazines were not physical culture or body-building publications, but were circulated primarily, if not exclusively, for homosexuals, and had no literary, scientific or other merit. The Court further found as a fact that the magazines would appeal to the "prurient interest" of such sexual deviates, but would not have any interest for sexually normal individuals, and the magazines are read almost entirely by homosexuals and that the ordinary male adult would not normally buy them. The Court held that obscenity requires proof of not only prurient interest appeal but also patent offensiveness.

The Court held that the magazines in question, taken as a whole, cannot under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency. Mr. Justice Harlan wrote that not every portrayal of male or female nudity is obscene and although the magazines are dismally unpleasant, un-

couth, and tawdry, they were not obscene. Mr. Justice Harlan expressly pointed out that under the First Amendment of the United States Constitution that the door into the First Amendment must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

Also included in Commonwealth's Exhibit C-1 were other nudist magazines, such as the "Gymnos" editions of September, 1961, November, 1961, July, 1961, January, 1960, and August, 1960, and Commonwealth's Exhibit C-2, containing "Gymnos" edition of December, 1961. These magazines were similar to the "Sunshine & Health" and "Helios" magazines.

Also included in Commonwealth's Exhibit 1 were other nudist publications including "Modern Sunbathing Annual", "Nude Living" and "Hellos Nudist Adventure in Sunny Greece".

Commonwealth's Exhibit 1 also included two calendars containing photographs of nude women called "Eden" and "Eve", 1962 calendars.

The remaining parts of Commonwealth's Exhibit 1 consisted of novelettes, some with pictures and some without pictures. It is submitted that none of the items contained in Commonwealth's Exhibit 1 were obscene within the Virginia statute. In 1961 the Court of Appeals for the State of New York in *People v. Richmond County News, Inc.*, 9 N.Y. 2d 578, 175 N.E. 2d 681, held that a magazine called "Gent" was not obscene within the State statute prohibiting obscene books and articles although the maga-

zine contained photographs, salacious cartoons and short stories of sexual seduction.

In *Grove Press, Inc.* v. *Christenberry*, 276 F. 2d 433, The Court of Appeals for the Second Circuit held that the book by D. H. Lawrence entitled "Lady Chatterley's Lover" was not obscene although the Postmaster General of the United States handed down a written opinion that the book was obscene in that it was replete with descriptions in minute detail of sexual acts engaged in or discussed by the principal characters in the book and that the descriptions used filthy, offensive and degrading words and terms. It is respectfully submitted that the court committed prejudicial error in introducing into evidence all of the thirty-three items in Commonwealth's Exhibit 1 and in admitting into evidence Commonwealth's Exhibit 2 and Commonwealth's Exhibit 3 in that some or all of the said items as a matter of law were not obscene.

III. Section 18.1-228, Code of Virginia, as amended, violates the First Amendment of the United States Constitution.

The definition of obscenity as contained in Section 18.1-227, Code of Virginia, apparently was patterned after A.L.I. Model Penal Code, Section 207, 10 (2). However, it omits the standard as set forth in *Roth* v. *United States*, 354 U.S. 476, for judging obscenity, adequate to withstand the charge of constitutional infirmity, in that it must be *to the average person, applying contemporary standards*, for the dominant theme to appeal to prurient interests.

It would further appear that Section 18.1-227, Code of

Virginia, makes "prurient interests" the sole test of obscenity. However, Mr. Justice Harlan in *Manual Enterprises, Inc., v. J. Edward Day, Postmaster General of the United States*, 30 L.W. 4492, supra, distinctly held that the prurient interest test is not the sole test of obscenity but also requires the test of patent offensiveness of the material itself.

IV. The refusal of the court to grant proposed instructions D-2, D-5, D-6, D-7, and D-9, requiring knowledge by petitioner that the magazines were obscene violated the First Amendment to the United States Constitution.

The Supreme Court of the United States in *Smith v. California*, 361 U.S. 147, declared unconstitutional a Los Angeles City ordinance prohibiting any person to have in his possession any obscene writing in any place of business where books are sold on the ground that it failed to include therein the requirement of knowledge that the books were obscene. Section 18.1-228, Code of Virginia, expressly requires knowledge on the part of the defendant. Yet the court refused to grant the instructions requested by the defendant pertaining to knowledge.

Therefore, petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Appeals of Virginia.

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APPENDIX

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday, the 4th day of October, 1962.

The petition of Arthur Goldstein for a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Norfolk on the 5th day of April, 1962, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.

A copy, Teste:

Clerk